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# TRIAL STRATEGY IN LESBIAN MOTHER CUSTODY CASES: THE USE OF EXPERT TESTIMONY

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Donna Hitchens\* and Barbara Price\*\*

In a contested child custody proceeding in which the mother is a lesbian, the eventual disposition of the case may depend more on the beliefs and attitudes of the judge around the issue of homosexuality than on the specific facts of the case. The judge in a child custody case is vested with broad discretion to determine a placement that is consistent with the best interests of the children.<sup>1</sup> In child custody cases generally, legal arguments and precedent are far less compelling than the factual presentation.<sup>2</sup> When the facts surrounding the case include the fact that the mother is a lesbian, an issue enters the case that is probably startling and offensive to the value system of the judge. Once the mother's lesbianism has been brought to the attention of the judge, it is an omnipresent issue in the case and requires extensive preparation and strategic thought on the part of the mother's attorney.

This article discusses the uses of psychological testimony in child custody cases where the judge has been informed that the mother is a lesbian and, therefore, her sexual preference can be

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1. For extensive discussions of the application of the best interests of the child standard to lesbian mother custody cases see Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979); and Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

2. This is not to say, however, that the proper presentation of legal arguments is not important. For an excellent commentary on the legal theory that should be advanced in lesbian mother custody cases see Hunter & Polikoff, *supra* note 1.

expected to be an issue in the case.<sup>3</sup> It is the opinion of the authors that once the mother's lesbianism has been brought to the attention of the court, it must be dealt with directly and forcefully. The alternative is to seek a ruling that the mother's sexual preference is irrelevant and, therefore, testimony on the issue should be prohibited or limited. The risk of such an approach is that the mother's attorney will be prohibited from presenting evidence that rebuts commonly held prejudices about homosexuals. Since the judge will know the mother is a lesbian, whatever biases and assumptions the judge holds about the propriety of lesbians raising children will never be confronted and may play a major role in the outcome of the case.<sup>4</sup>

In order to use psychological testimony effectively in lesbian mother cases, it is essential that the attorney representing the lesbian mother understand the attitudes likely to be encountered at trial and be aware of effective ways of dealing with those attitudes. In an attempt to offer practical assistance to attorneys representing lesbian mothers, this discussion is divided into three sections: first, an overview of the prejudices most often encountered in lesbian mother cases; second, the types of psychological and social science evidence that can be presented to the court; and third, the selection and management of psychological and social science testimony.

## I. HOMOPHOBIA AND CHILD CUSTODY

Homophobia,<sup>5</sup> like racism and sexism, pervades our society and is just recently being examined and challenged as an irrational basis of widespread discrimination.<sup>6</sup> Our society, unlike the majority of human societies, has long been immersed in fear of homosexuality.<sup>7</sup> Until recently, unbiased examination and reporting of lesbian behavior and attitudes by the mental health

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3. The use of the word "psychological" to describe certain types of evidence and testimony throughout this article includes psychiatric evidence; for an excellent discussion of strategies for keeping the lesbian issue out of the court proceeding see Hunter & Polikoff, *supra* note 1, at 715-720.

4. See text accompanying notes 21-23, *infra*.

5. Homophobia is described as an unhealthy attitude of fear, anger, or hatred towards homosexuals and homosexuality. G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* (1972).

6. For a survey of cases challenging sexual preference discrimination see Rivera, *supra* note 1.

7. C. FORD & F. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* 125, 130 (1972), cited in Basile, *Lesbian Mothers I*, 2 *WOMEN'S RIGHTS L. REP.* 3 (1974).

professions had been nonexistent.<sup>8</sup> Consequently, family court counselors and judges have not been exposed to accurate and scientific resources that might offset commonly held societal beliefs and biases about homosexuals. These beliefs, more in the nature of assumptions, can play a major role in a child custody case where the mother is known to be a lesbian.<sup>9</sup> Unfortunately, many of these biases are also held by mental health professionals, some of whom may be called to testify at trial. In reviewing the transcripts from a number of lesbian mother cases, it was discovered that the most common biases and assumptions held by judges and mental health professionals tend to fall into three general categories — the sexual behavior of lesbians, the effects of homosexual parenting on children, and the social stigma affecting children raised by lesbian mothers.

#### A. SEXUAL BEHAVIOR OF LESBIANS

A 1967 California case, *Nadler v. Nadler*,<sup>10</sup> is illustrative of commonly held assumptions about lesbian social and sexual behavior. In *Nadler*, the lesbian mother lost custody of her four year old daughter to her husband at the time of the dissolution of their marriage.<sup>11</sup> At her second trial, the mother was required to give the names and addresses of anyone with whom she had sexual activity during the previous two years,<sup>12</sup> state how often she had sexual relations,<sup>13</sup> and answer unfounded questions about whether she had ever been a prostitute.<sup>14</sup> At one point during the examination of the mother, the judge asked her, "Ma'am, will you explain to the Court exactly what occurs — we talk here generally of a homosexual act. Just what does this entail? What do you do?"<sup>15</sup>

The psychiatrist testifying on behalf of the mother agreed that she "[had] an affection for [her children], a warm relationship with them, and this affection and this warmth and strength

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8. See Section II, *infra*, for references to recent research in the area of mental health.

9. For one judge's viewpoint, see Campbell, *Child Custody: When One Parent is a Homosexual*, 17 THE JUDGES' J. 38 (Spring 1978).

10. No. 177331 (Cal. Super. Ct., Sacramento County, Nov. 1967).

11. At the first trial in *Nadler*, the judge awarded custody to the father as a matter of law. On appeal it was held that homosexuality per se did not constitute unfitness and a second trial was ordered. *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (3d Dist. 1967). The discussion of *Nadler* in this article concerns the second trial.

12. Reporter's Transcript at 6-7, *Nadler v. Nadler*, No. 177331 (Cal. Super. Ct., Sacramento County, Nov. 1967).

13. *Id.* at 16-17.

14. *Id.* at 17.

15. *Id.* at 20.

of her relationship would lead her to be a good parent in the sense that she [cared] properly for their needs, both physical and emotional."<sup>16</sup> He later testified that the mother had "definite problems" in the area of sexual adjustment,<sup>17</sup> although he never described those problems. Because he was not required to explain the nature of the mother's problems, the implication was left that her lesbianism was synonymous with sexual maladjustment.

During the redirect examination of this witness, the judge interrupted the testimony to ask: "Could she harm her own child, the daughter, by this activity? Is there any potential that she might use the child in this activity?"<sup>18</sup> The witness responded in the negative.

At the conclusion of the trial, the judge advised the mother to "get therapy,"<sup>19</sup> and awarded custody to the father, stating that he could not "take the chance that something untoward should happen to [the child]."<sup>20</sup>

The comments of the judge during the *Nadler* trial are examples not only of the fact that courts are limited by a lack of accurate research and information in the area of homosexuality, but also that previously ingrained prejudices may very well control their final evaluations.

The popular beliefs that lesbians are promiscuous, might sexually harm their children and are sexually maladjusted have continued to be themes in lesbian mother custody cases. Intertwined with these beliefs is a fear by some judges that allowing the mother to be with both her lover and her children will result in undesirable sexual behavior.

In *Mitchell v. Mitchell*,<sup>21</sup> the lesbian mother sought to avoid some of the accusational aspects of the *Nadler* case by stipulating that she was a lesbian, that her lesbianism was irrelevant and that any mention of it in court would be harassment.<sup>22</sup> Conse-

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16. *Id.* at 36.

17. *Id.* at 29.

18. *Id.* at 50.

19. *Id.* at 67.

20. *Id.*

21. No. 240665 (Cal. Super. Ct., Santa Clara County, June 8, 1972). Information on this case was provided by attorney Margot G. Hagaman.

22. *Id.*

quently, she was able to present her case as a good mother without having to defend herself as a lesbian. However, by stipulation she was also precluded from presenting any evidence to rebut the fears and prejudices surrounding lesbianism. The result in the *Mitchell* case was that the award of custody to the mother was conditioned upon the mother living separately from her partner and never associating with her partner in the presence of the children.<sup>23</sup>

An even more dramatic example of the undefined fear of the actual lesbian relationship is *In re Georgesen*.<sup>24</sup> Although a psychiatrist testified that the mother was the primary parent and that her lesbianism was not a negative factor in her relationship with her children,<sup>25</sup> custody was awarded to the father. The mother was granted limited visits to the home of the father and allowed to see her children only in the presence of other adults.<sup>26</sup> Although the mother had moved hundreds of miles away, her summer visitation was limited to visits in the county in which the father resided and only if her lover was not within the county.<sup>27</sup> Such restrictions on custody or visitation necessarily imply that judges believe lesbian mothers will engage in sexual activity in front of their children or that they will sexually molest their children if allowed unfettered visitation.

## B. EFFECTS OF HOMOSEXUAL PARENTING

A topic that generally consumes a great deal of time during lesbian mother trials involves the possible effects on a child who is raised by a homosexual parent. Major concern is often demonstrated over whether the child will grow up to be homosexual and whether the child will have confused sex role identification.

Examples of commonly held assumptions that the children of lesbian mothers are more likely to grow up homosexual and be confused about their own sexual identity are readily available from case transcripts.

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23. *Id.*

24. No. 53359 (Cal. Super. Ct., Humboldt County, February 21, 1974).

25. *Id.* This information was provided by the psychiatrist who testified as an expert witness in the case.

26. *Id.*

27. *Id.*

In the *Nadler*<sup>28</sup> case, there was expert testimony that the children would be more likely to seek a heterosexual relationship if they were with a heterosexual parent.<sup>29</sup> The psychiatric expert further testified that "a person who has difficulty reflected in homosexual activity per se has considerable difficulty in their sexual roles,"<sup>30</sup> and that this could cause difficulties for the children.<sup>31</sup> This testimony was in no way substantiated by empirical research or professional studies. When the psychiatrist was asked by the mother's attorney whether he had observed, in his examination of the child, any difficulty in her development, the judge prevented the answer without an objection from the opposing attorney. The judge reasoned that the doctor had not conducted a complete enough examination to be able to give such an opinion.<sup>32</sup>

*In re Nicholson*<sup>33</sup> is a lesbian mother custody case that was lost by the mother specifically because she would not be providing a heterosexual role model.<sup>34</sup> Although there were numerous witnesses and substantial testimony favorable to the particular lesbian mother in this case, there was no testimony directed at re-educating the judge about homosexuality. In a twenty-five page opinion, the judge enunciated his views that both parents were well qualified, but the mother could not offer a heterosexual role model. The judge stated:

[t]he Court observes that the situation in the home occupied by petitioner and [her partner] is now the optimum which the petitioner can hope to offer. This is not true in the case of respondent. He may remarry and establish a home where the children would have the attention of both a father and a step-mother. The Court realizes that this might turn out to be a situation worse for the children than is presently offered them. It also might be substantially better. In the home of the respondent any changes may create either a better or a

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28. No. 177331 (Cal. Super. Ct., Sacramento County, Nov. 1967).

29. *Id.* Reporter's Transcript at 39-40.

30. *Id.* at 46.

31. *Id.* at 47.

32. *Id.* at 51.

33. Docket number unavailable because case sealed by the court. (Iowa Dist. Ct., Iowa County, Nov. 1974).

34. *Id.* Findings of Fact and Conclusions of Law, at 20, on file at the offices of Golden Gate University Law Review.

worse environment for the children. Any changes in the home of the petitioner and [her partner] can only be in the direction of a deterioration of the present situation.

Both would of necessity involve the employment of baby-sitters. At the home of the petitioner the children would be in an all female environment. At the home of the respondent they will be in a male environment, but on occasions when with the babysitter they will be in a female environment in a heterosexual home.<sup>35</sup>

Although the judge maintained that his decision was not based on the mother's lesbianism,<sup>36</sup> only two other issues were even mentioned in the opinion. The result in *Nicholson* indicates that psychiatric testimony of the mother's primary and constructive parental relationship with her children may not be enough to overcome the impact of her lesbianism. Additional expert testimony may be necessary to educate the court regarding the sex role development of children and how social values are learned in this society. It may also be necessary to rebut testimony by the father's expert that the children will become confused about their proper sex role.<sup>37</sup>

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35. *Id.* at 17, 18.

36. *Id.* at 23.

37. In *Smith v. Smith*, No. 125497 (Cal. Super. Ct., Stanislaus County, Feb. 9, 1978), the clinical psychologist testifying for the father expressed concern that the female children would acquire behaviors or mannerisms inappropriate to their sex if allowed to remain with their lesbian mother. *Id.* Reporter's Transcript at 41.

In *In Re Risher*, (Docket No. unavailable) (Tex. Dom. Rel. Ct., Dallas County, April 16, 1976), the father's expert testified that the mother had exhibited poor judgment in that she allowed her son to wear a YWCA T-shirt. On cross examination this expert testified as follows:

Q. Doctor, you made allusion to the fact that Richard Risher came to your office wearing a YWCA T-shirt, did you not? And from that incident you drew the conclusion that that was poor judgment on the part of Mary Jo Risher?

A. I certainly did. I thought it was ridiculous.

Q. Would it surprise you to know that Richard Risher goes to the YWCA to take gymnastics lessons?

A. No it would not.

Q. Would it surprise you to know that he wears a YWCA shirt to go there?

A. I have observed him wearing it. But I must say that when you're dealing with this particular issue, and I'm not criticizing sexual preference, but the manner in which the parent is dealing with it. I think that is most ill-advised.

Q. So it would have been better advised if he was told not to wear his YWCA shirt to the YWCA where he is to wear it?



A contributing factor to the concern over confused sex role behavior is the belief that lesbians act out male and female heterosexual roles, seen as harmful when it occurs between same sex people.

In *In re Mathews*<sup>38</sup> a psychiatrist, the director of Children's Services in the county, testified on behalf of the mother. The sum of her testimony was that the mother was dealing with her lesbian relationship and her children in a mature and sensitive manner and, as the psychological parent, should retain custody.<sup>39</sup> The judge maintained that there was a husband and wife relationship between the mother and her partner since the partner took the son to Cub Scout meetings like a father would.<sup>40</sup> The witness responded that the woman took the child to Cub Scouts the way an aunt or grandmother would.<sup>41</sup> The judge responded to the witness by stating, "Oh, come on now, you and I both know what's going on."<sup>42</sup>

*In re Mathews* is another example of using psychiatric testimony to support the recommendation of giving custody to the mother, but failing to use such testimony to address the preconceived assumptions about lesbians held by judges. That is not to say that the result would have been different had additional testimony been provided, but it is possible that the biases of some

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A. No. It would be much better for him to have matriculated into a YMCA program. And it would be much better for a mother to encourage those kinds of masculine identifications.

Q. Doctor, are you aware or do you know that there are programs offered at the YWCA centers for boys?

A. I was not aware of that, but it doesn't change my view of things one whit, if you're dealing with a child with special problems. Now, I don't see anything wrong in the ordinary sense with a boy attending programs at the YWCA or a girl attending programs at the YMCA; that's perfectly fine as far as I'm concerned. But when you have the particularly sensitive issue here that Mrs. Mary Jo Risher is cognizant of—she is an intelligent, sensitive, bright lady—she owes the responsibility in my judgment to try to meet this special need, and not advance in my view the YWCA experience.

*Id.*, reprinted in G. GIBSON, BY HER OWN ADMISSION 165-166 (1977).

38. Docket number unavailable because case sealed by the court. (Cal. Super. Ct., Santa Clara County, 1975).

39. *Id.* Reporter's Transcript.

40. *Id.*

41. *Id.*

42. *Id.*

judges could be altered with effectively presented expert testimony.

In addition to concerns about the sexual development of children raised by lesbians, the issue of moral development also arises. In older cases, courts were allowed to use a subjective test of morality and were fairly direct in their disapproval of lesbian relationships.<sup>43</sup>

More recently, California courts have observed that child custody decisions should not be based on the judge's opinion of the morals and personal characteristics of a parent that do not harm the children.<sup>44</sup> Nevertheless, allusions to the immorality of the mother's lifestyle are not uncommon in lesbian mother cases.<sup>45</sup> Furthermore, judges may assume harm to the child from being raised in an environment that offends the judge's sense of morality.

The issue of morality continues to be present but is often more obscure.<sup>46</sup> Attorneys representing lesbian mothers should

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43. In *Bunim v. Bunim*, 298 N.Y. 391, 83 N.E. 2d 848, 85 N.Y.S. 391 (1949), the court stated:

Defendant here, in open court, has stated her considered belief in the propriety of indulgence . . . in extramarital sex experimentation. It cannot be that 'the best interests and welfare' of those impressionable (children) will be 'best served' by awarding their custody to one who proclaims, and lives by, such extraordinary ideas of right conduct.

*Id.* at 394, 83 N.E. 2d at 849, 86 N.Y.S. 394. Another example is available from a 1959 California case, *Immerman v. Immerman*, 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (2d Dist. 1959). In reversing a lower court ruling that testimony on the mother's sexual activities was inadmissible, the court of appeal observed: "The moral character, acts, conduct and disposition of one who seeks the custody of a child are relevant matters which the trial court must consider." *Id.* at 127, 1 Cal. Rptr. 301.

44. *Clarke v. Clarke*, 35 Cal. 2d 259, 217 P.2d 401 (1950); *Stack v. Stack*, 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1st Dist. 1961); *In re Marriage of Ciganovich*, 61 Cal. App. 3d 289, 132 Cal. Rptr. 261 (3d Dist. 1976).

45. See, e.g., Reporter's Transcript at 37-38, *Nadler v. Nadler*, No. 177331 (Cal. Super Ct., Sacramento County, Nov. 1967); Findings of Fact and Conclusions of Law, at 20; *In re Nicholson*, Docket number unavailable because case sealed by the court (Iowa Dist. Ct., Iowa County, Nov. 1974).

46. In *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (2d Dist. 1975), the court of appeal upheld an award of custody to the grandparents, and observed:

Next, homosexuality is a factor which the trial court could consider. At bench, this factor is not merely fortuitous or casual, but rather it dominates and forms the basis for the household into which the children would be brought if custody were awarded to appellant. Appellant does not merely say she is

expect the elusive concept of morality to be of concern to the court, and should further expect the judge to assume harm to the children even if no specific testimony of adverse effect has been presented.

### C. SOCIAL STIGMA FOR THE CHILD

One of the assumptions an attorney representing a lesbian mother can expect to encounter during trial is that children will experience a harmful stigmatization as a result of living in a lesbian household.<sup>47</sup>

In *Smith v. Smith*,<sup>48</sup> the psychologist testifying for the father

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homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her daughters in that environment. . . . The commission of certain homosexual acts is a criminal offense in California (Pen. Code, §§ 286, 288a), albeit an offense not readily susceptible to criminal prosecution. The fact that in certain respects enforcement of the criminal law against the private commission of homosexual acts may be inappropriate and may be approaching desuetude, if such is the case, does not argue that society accepts homosexuality as a pattern to which children should be exposed in their most formative and impressionable years or as an example that should be put before them for emulation. In exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests.

*Id.* at 46-47, 119 Cal. Rptr. at 25-26.

47. A common attitude of the court is illustrated by the judge's opinion in *In re Nicholson*, docket number unavailable because case sealed by the court, (Iowa Dist. Ct., Iowa County, Nov. 1974), denying custody to the mother:

In their present neighborhood the children are known and liked and have established an acquaintance with the adults and friendships with the children. How extensive their associations would be in the neighborhood of the home of petitioner and [her partner] is a question. There are some twenty-six children in the block, but the record in this case discloses that the petitioner and [her partner] live very much to themselves as far as the neighborhood is concerned, this being a normal result of what would be considered by many their abnormal relationship. The court feels that with the respondent, the children would have more numerous and more satisfying contacts with their peers and the neighborhood adults than would be true in the neighborhood to which the petitioner would take them.

*Id.* Findings of Fact and Conclusions of Law, at 18, on file at the offices of Golden Gate University Law Review.

48. No. 125497 (Cal. Super. Ct., Stanislaus County, Feb. 9, 1978).

expressed the view that if it became known that the children's mother was a lesbian, the children "could be seriously harmed."<sup>49</sup> Later, on cross-examination, this witness testified as follows: "A. They are really amazing little girls. They're very bright. . . . Q. When you suggest that a change of custody would be appropriate, that's because of your fears for the future, is that it? A. That's correct."<sup>50</sup> It was clear from the overall testimony that one of the psychologist's fears for the future was that the children would be exposed to some kind of ridicule because their mother was a lesbian.

## II. AVAILABLE PSYCHOLOGICAL AND SOCIAL SCIENCE EVIDENCE

The ideal presentation of psychological and social science evidence in a lesbian mother custody case includes calling a number of expert witnesses over a period of several days and at considerable expense. The number of experts that should be called to testify will be affected by the attorney's evaluation of the facts of the case, the financial resources of the client, the inclinations of the presiding judge, the arguments advanced by the opposing party, and the expert witnesses available to testify. This section assumes an ideal situation in terms of access to expert testimony. Its purpose is to provide the lesbian mother's attorney with an overview of the types of evidence that can be utilized during the trial.

There are two general categories of expert testimony that should be considered. The first of these involves testimony specific to the mother and children involved in the case. The second category of testimony is directed at counteracting the myths and assumptions about lesbianism and lesbian parenting.

### A. EVALUATION OF THE PARTIES

A comprehensive psychological evaluation of the mother and her children should be conducted prior to the trial. This evaluation can be done by a psychiatrist, clinical psychologist or psychiatric social worker. The evaluation and subsequent testimony should include: (1) the general emotional stability of the mother; (2) the mother's parenting ability; (3) the emotional stability and

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49. *Id.* Reporter's Transcript at 29.

50. *Id.* at 38.

general development of the children; (4) the nature of the relationship between the mother and the children; (5) the atmosphere of the home; (6) the ability of the mother to cope with the problems of living in this society as a lesbian; and (7) the mother's understanding of the kinds of problems that might arise for her children, and her ability to cope with questions the children might pose regarding variant sexual preference.

If the mother's partner is living in the home with the children, she should also be interviewed. It is important that the expert be able to comment on the various relationships of people within the family unit. If possible, the father or other adult contesting the mother's custody should be evaluated by the same expert on the same factors. In most jurisdictions, including California, this will require that the person consent to such an evaluation, or that the court order such an evaluation. An obvious consideration in seeking such an order is the probability that the mother will have to consent to an evaluation by the opponent's expert. Before pursuing this alternative, the mother's attorney should find out as much as possible about the opposing expert, including biases about homosexuality, and make a realistic determination about how the mother will fare in such a situation. The mother's own expert should be able to offer some advice about the possible outcome of a psychological evaluation of the mother by a potentially hostile psychiatrist or psychologist.

An expert witness presenting testimony regarding the parties to the action may also be asked some generalized questions about homosexuality. Although it is not a substitute for presenting separate expert testimony directed specifically at rebutting societal myths around homosexuality, the attorney should anticipate this type of questioning and be prepared to use it effectively.

An example of how both generalized and specific testimony can be interwoven is found in the testimony of one expert in *H. v. H.*<sup>51</sup> The expert had testified that the relationship between the child and the mother was good and that the home environment was solid. Later, in response to a question about whether the child would be embarrassed by the mother's lesbianism, the expert testified:

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51. No. 55900 (Ohio Ct. C.P., Div. Dom. Rel., Licking County, Oct. 31, 1973).

I would say it is a possibility. . . . We are going through a period of dramatic social change, and it depends upon particularly how young children view the way people behave and act. Homosexuality, which was so much of a taboo twenty years ago, is much more open to discussion today and we know people live in a variety of lifestyles . . . I think some of us grow on a degree of adversity quite well, and I don't believe the child is going to be stigmatized that [sic] all children, for a variety of reasons at one point or another are, for example, [sic] short or tall, fat or skinny, athletes or sissies. Some children get taunted throughout their lives, and we all have labels that we have been taunted with in our lives, but it doesn't destroy us. I think weighing the possible embarrassment she may experience against continuing in a solid home relationship, I would come out on the side of continuing the home relationship, and in fact, we may not see very much embarrassment as society continues to change.<sup>52</sup>

#### B. REBUTTING GENERAL MISCONCEPTIONS

The second category of psychological and social science evidence that should be presented at trial is expert testimony directed at rebutting the common myths of lesbian behavior. This type of evidence can be presented through some combination of sociologists, anthropologists, psychologists and psychiatrists. What is essential in this testimony is that the witness have expertise in one or more of the following areas: sex role development in children, healthy homosexual behavior, homosexuality as a variant as opposed to deviant behavior, gender role models, child molestation, ways in which cultural attitudes and values are transmitted to children, the stress involved when a child is separated from the parent that has been the primary provider, and how children deal with stigma and differences.

The following are examples of how expert testimony can be developed to counteract prevailing homophobic myths.<sup>53</sup>

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52. *Id.* Reporter's Transcript at 32-33.

53. The authors would like to express their deep appreciation to Del Martin and Barbara Bryant for their reviews of psychological research on lesbians and lesbian mothers. D. Martin, *Psychosocial Implications in Lesbian Mother Custody Cases* (1979) (paper prepared for presentation at the Annual Meeting of the American Psychiatric Association).

1. *Lesbians Are Mentally Ill and Emotionally Unstable.* The expert witness should be familiar with and able to testify to the fact that in 1973 the American Psychiatric Association removed homosexuality from its list of mental disorders. The witness should also be able to testify about research which shows that there are no significant psychological differences between heterosexual women and homosexual women.<sup>54</sup> In fact, some studies have indicated that lesbians may surpass heterosexuals in areas significant to mental health.<sup>55</sup>

2. *Children Raised By Lesbian Mothers Will Become Homosexual.* There are two ways to rebut the presumption that the children of lesbian mothers are likely to become homosexual. First, the witness can testify to the absence of any scientific evidence supporting such a position. For example, in *Ranson v. Ranson*,<sup>56</sup> a psychiatrist who had been qualified as an expert in the sexual identity of children described various schools of thought regarding the origins and causation of homosexuality.<sup>57</sup> The testimony then continued as follows:

Q. Now, Doctor, I noticed a somewhat conspicuous absence in that delineation of different types of theories.

Is there any school of thought or do you know of any research concerning the effect on a child's sexual development with having a homosexual parent? Is that part of the cause that goes into causing a new homosexual person?

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tion); B. Bryant, *Lesbian Mothers* (May 1975) (unpublished thesis submitted for degree of Master of Social Work, Cal. State Univ., Sacramento).

54. Thompson, McCandless & Strickland, *Personal Adjustment of Male and Female Homosexuals and Heterosexuals*, 78 J. ABNORMAL PSYCH. 237-240 (1971); Armon, *Some Personality Variables in Overt Female Homosexuals*, 24 J. PROJ. TECHS. 292 (1960); M. FREEDMAN, *HOMOSEXUALITY AND PSYCHOLOGICAL FUNCTIONING* (1971); A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 215-216 (1978).

55. Hopkins, *The Lesbian Personality*, 115 BRIT. J. PSYCH. 1433 (1969) (found lesbians to be more independent, resilient, reserved, dominant, bohemian, self-sufficient and composed than heterosexual women); Siegelman, *Adjustment of Homosexual and Heterosexual Women*, 120 BRIT. J. PSYCH. 477 (1972) (found lesbians were not more neurotic than heterosexual women and observed that in some respects lesbians were better adjusted); Oberstone & Sukoneck, *Psychological Adjustment and Lifestyles of Single Lesbians and Single Heterosexual Women*, 1 PSYCH. WOMEN Q. 172 (1979) (found lesbians expressed a greater satisfaction with their relationships than heterosexual women).

56. No. 477051-8 (Cal. Super. Ct., Alameda County, Nov. 9, 1977).

57. *Id.* Reporter's Partial Transcript of Proceedings, Examination of Dr. Richard Green at 11-13.

A. That is not a theory of development of homosexuality. In an almost semi-facetious manner, one can argue really that all the theories of the development of homosexuality look at heterosexual parents and look at problems in the heterosexual relationship between parents as leading to homosexuality.

So that again, being somewhat facetious, one can argue that the best way to become homosexuals would be to have heterosexual parents and not the other way around.<sup>58</sup>

Another approach to dealing with the question of whether children raised by lesbians will themselves become homosexual is to present current social science literature that either surveys the family background of homosexual persons or studies the children of homosexual parents. The evidence indicates both that the majority of lesbians had heterosexual parents and that the children of lesbian parents were heterosexual.<sup>59</sup>

The concern about whether the children will be predisposed to a homosexual lifestyle during their adult years also involves the question of whether the children have confused sex role identity.<sup>60</sup> When dealing with these issues, it is helpful if the attorney can tie together testimony about the development of sex roles and sexuality generally with specific information about the individual children involved. For example, in the companion cases of *Isaacson v. Isaacson* and *Schuster v. Schuster*<sup>61</sup> the mothers' attorneys presented several experts. The witnesses included a sociologist, three psychiatrists and three psychologists. They presented testimony covering sexuality in general, changing social mores, homosexuality, homosexual parenting, psychological evaluations of the mothers, of the children, of the family units and home environment, the mother/child relationships specifically,

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58. *Id.* at 13.

59. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AMER. J. PSYCH. 692 (1978) (of the 37 children studied, 36 were heterosexually oriented).

60. Sex role refers to "attitudes and behavior patterns adopted as an expression of masculinity or femininity." 11 R. GOLDENSON, THE ENCYCLOPEDIA OF HUMAN BEHAVIOR 1198 (1970). The concern that emerges in lesbian mother custody cases is that the child might behave in ways inappropriate to his/her sex.

61. *Isaacson v. Isaacson*, No. D-36867, and *Schuster v. Schuster*, No. D-36868 (Wash. Super. Ct., King County, Sept. 3, 1974), *aff'd in part*, *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978) (hereinafter *Isaacson*).



and the damage created by separating a child from the primary parent.

At the conclusion of these consolidated cases, the judge stated:

In this case almost all of the testimony of all the people who actually saw, examined, talked to the children was that the children are healthy, happy, normal, loving children. And I must so find. Their living situation during the past twenty months with custody in the mother and visitation with the fathers has proved to be in the best interests of the children as shown by the way they have turned out.

Testimony introduced by petitioners questions whether this will always be so and suggests that children raised by homosexual mothers may be more likely to become homosexuals than if raised by heterosexual parents. Respondents' witnesses discredited this theory. I was particularly impressed with the opinion of Dr. Kaufman, the psychiatrist appointed by the Court, who was also appointed by the Court at the prior hearing, that although these children will grow up knowing more about homosexuality and human sexuality in general than most children, this knowledge need not predispose them to become homosexuals.<sup>62</sup>

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62. Isaacson, No. D-36867 (Wash. Super. Ct., King County, Sept. 3, 1974) from transcript of the Court's Oral Decision at 5-6 (before Judge Norma Achley). In *H. v. H.*, No. 55900 (Ohio Ct. C.P., Div. Dom. Rel., Licking County, Oct. 31, 1973), a psychiatrist was asked what reaction a child would have to seeing homosexual parents in a loving relationship and he responded:

A. My guess is that the most significant effect that this would have in the long haul would be that the child would tend to view homosexuality in others in a more tolerant and less prejudice manner than the child who grows up with the typical kind of myths they may get from the street corner gossip that most of us grow up with. An analogy can be made to a child that grows up in the ghetto or racially integrated neighborhood or with a very restricted background. It doesn't mean the child who comes from a Protestant family growing up next to the Catholic is going to revert to Catholicism per se, but it can mean they could have a greater understanding of the two and be more tolerant of the two different religions and two different viewpoints. I think the same thing is true with respect to homosexuality. Children cannot grow up today in a social vacuum.

3. *Lesbian Mothers are Sexually Maladjusted.* The assumption that lesbian mothers are likely to molest, or engage in sexual behavior in front of their children, and judicial willingness to presume harm to children raised in such an atmosphere, is probably based, at least in part, on viewing the mother as sexually maladjusted. An increasing number of studies and articles by mental health professionals clearly refute these views of lesbian parenting.

In addition to research on the psychological adjustment of homosexual women,<sup>63</sup> a variety of studies have been conducted on lesbian relationships; the results show that lesbian relationships are as stable and mature as heterosexual relationships.<sup>64</sup> Furthermore, the social science literature indicated that children who are raised by lesbian mothers are not psychologically harmed, and in fact may benefit from being raised in such an environment.<sup>65</sup>

An expert witness familiar with the phenomenon of child molestation will be able to respond to the assertion that lesbian mothers might molest their children. For example, in the *Ranson*<sup>66</sup> case, a psychiatrist testified as follows: "Incest or child molestation within the family essentially is primarily an issue

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They recognize their own family in one of many respects, be they atypical or not, and they also recognize culture and standards. They recognize the male-female relationship. They recognize the peer group. They see the male-female role modeling portrayed in movies and television. They read children's stories and what they do is put their own family to some kind of perspective with the rest of the culture and what comes out of that is that they adopt the standard and traditional culture perspective with greater tolerance of people whose life-style is atypical, and I think this is of some benefit to the child in being freer of a lot of prejudices of any sort. I think that would be the only significant change would be a tolerance of homosexuality in others.

*Id.* Reporter's Transcript at 25-26.

63. See notes 54 and 55 *supra* and accompanying text.

64. Cotton, *Social and Sexual Relationships of Lesbians*, 11 J. OF SEX RESEARCH 139 (1975); A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978).

65. M. Ramey, S. Stender, G. Dunn, Pilot Study of the Psychological Status of the Children of Lesbian Mothers, preliminary results in Report of the California Women Lawyers' Child Custody Project 22-24 (1977). For information on obtaining this report, contact the offices of Stender & Stender, 1714 Stockton Street, San Francisco, California 94133. See also statement of Dr. Donna Martin in Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer be Denied*, 12 SAN DIEGO L. REV. 859, 859-60 (1975).

66. No. 477051-8 (Cal. Super. Ct., Alameda County, Nov. 9, 1977).

involving stepfathers and fathers, and their daughters. Child molestation, victimization of children sexually is not an offense or a crime that is reported for females. It's almost non-existent."<sup>67</sup>

The phenomenon of child molesting was researched in depth recently by the Oregon Task Force on Sexual Preference.<sup>68</sup> Based on statistics gathered from the Children's Services Division and police records, the Task Force concluded that "[s]exual offenses against children are perpetrated by males" and "[t]he great majority are heterosexual in nature."<sup>69</sup>

4. *Children Raised By Lesbian Mothers Will Be Socially Stigmatized.* There is no evidence to support the assumption that children growing up in lesbian households are ostracized by their peers. In fact, there is evidence of a growing acceptance of homosexuality. Numerous professional and religious groups have adopted policies or resolutions favoring civil rights protection for homosexuals.<sup>70</sup> In presenting expert testimony, it is desirable for the witness to comment on this phenomenon as evincing a growing acceptance of homosexual lifestyles.<sup>71</sup>

Expert testimony should also be directed at the possibility that a child might encounter discrimination. One possible response is to compare the experience of being raised in a lesbian home with that of being of a different race or religion from other people living in the neighborhood.<sup>72</sup>

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67. *Id.* Reporter's Transcript at 18.

68. The Oregon Task Force on Sexual Preference Preliminary Report is reprinted in full at 3 SEXUAL L. REP. 46 (1977).

69. *Id.* at 52-53.

70. For the texts of resolutions passed by the National Education Association, United Church of Christ, Unitarian-Universalist Association, National Federation of Priests' Councils, Lutheran Church in America, American Psychiatric Association, American Library Association, and Young Women's Christian Association, see V. MYERS, SEXUAL PREFERENCE STUDY 50-54 (1976) (prepared for the City of Tulsa, Oklahoma and available from the Community Relations Commission, 200 Civic Center, Tulsa, Oklahoma 74103). For a comprehensive compilation of statements and letters of support for the recognition of homosexual lifestyles that includes some California organizations see Gay Community of Concern, Ending Discrimination Against Lesbians and Gay Men (1976), P. O. Box 8265, Stanford, California 94305.

71. If the mother's attorney is aware of the judge's religion, it might be helpful to investigate that religion's position on homosexuality. If it is favorable, consideration should be given to having a member of that religion's clergy testify on the background and position of the religious organization.

72. For a discussion of dealing with stigma, that includes a list of appellate cases rejecting stigma as grounds for denying custody to racially mixed couples, see Hunter & Polikoff, *supra* note 1, at 730-731.

Denying custody does not eliminate the mother's lesbianism. The child still has a lesbian mother and possibly faces a greater stigmatization as a result of having a mother who is considered so immoral or dangerous that she is denied the custody of her children.

5. *Given a Choice Between a Heterosexual and a Homosexual Home When All Other Factors Are Equal, the Children Should Be Placed in the Heterosexual Home.* Most courts will assume that where the parenting abilities of both the mother and the father are equal, the children are better off with the heterosexual parent.<sup>73</sup> This is perhaps the most difficult question to deal with in a lesbian mother custody trial. The first attempt, of course, is to show that the important parenting factors are not equal. If the children have been living with the mother, it is necessary to put on evidence about the importance of continuing the primary relationship that has developed and the harm done to children who are separated from their primary parent.<sup>74</sup>

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In *Ranson v. Ranson*, No. 477051-8 (Cal. Super. Ct., Alameda County, Nov. 9, 1977), the psychiatric expert was questioned on the issue of stigma and testified:

Q. What do you think are the possible important things in a child's life in learning how to deal with such teasing?

A. Well, I think out of some — out of some of that adversity of teasing comes inner strength.

I think having some support from a loving home, if you can go to and say, "I'm being teased," and have someone to turn to for comfort, I think that's important.

I think also having siblings is important if you and your siblings are being teased. Usually, it's for the same thing, particularly it's an ethnic or racial, religious background, having a sibling who's in the same boat you're in, I think this could be helpful to share that experience.

Q. If a child had been teased about sex, went home and the parent didn't want to talk about sex, would that help or hinder the child from dealing with that teasing?

A. I would suggest that it would hinder. I think that kids do need a chance to vent their feelings that are inside, that are troubling them rather than just bottling them up . . . , I think it is important to be able to share this with someone who is sympathetic and hears it and makes you feel better.

*Id.* Reporter's Transcript at 37-38.

73. See, e.g., *In re Nicholson*, docket number unavailable because case sealed by the court. (Iowa Dist., Iowa County, Nov. 1974), Findings of Fact and Conclusions of Law, at 20.

74. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Campbell, *Child Custody: When One Parent is a Homosexual*, 17 *THE JUDGES' J.* 38 (1978).

In *People v. Brown*,<sup>75</sup> two lesbian mothers sharing a home with their total of eight children lost custody of their children because of their lesbianism. In the two years it took to challenge that decision, each child was placed in a separate heterosexual foster home and allowed very restricted visitation by their mothers. By the time the court reinstated custody, one of the children had experienced a nervous breakdown, one had dropped out of school and one had developed severe emotional problems.<sup>76</sup>

In *Smith v. Smith*,<sup>77</sup> a child psychiatrist discouraged a change of custody from the lesbian mother to the father. The two children had lived with the mother since their parents' divorce four and a half years earlier.<sup>78</sup> The witness testified:

Stability is a primary factor in development; knowing that there's a particular adult you develop in proximity to and around; and that [st]ability is important to maintain unless there's some good reason not to. I would be concerned that at this stage that taking the girls from their mother for a reason that they really don't understand, after a time, even though they may be temporarily excited about moving to a new place—just like anybody would be excited about a move—that after a period of time with stress normally encountered in developing, that with some stress that they would want to return to their mother or they would want to be with their mother more because she's the main person that's been supportive to them over the years. If they couldn't do that and they were denied access to their mother because of mom's preference for other women, I don't think the children at this age would understand that . . . I imagine they'd become angry with their father for preventing that or displa[ce] some of the anger on the step-mother, which is often the case. And could actually produce the opposite result that you'd want.<sup>79</sup>

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75. 49 Mich. App. 358, 212 N.W. 2d 55 (1973).

76. This information was provided in a telephone conversation with William T. Hayes, attorney for the mother.

77. No. 125497 (Cal. Super. Ct., Stanislaus County, Feb. 4, 1978).

78. *Id.* Reporter's Transcript at 7.

79. *Id.* at 75-76.

The above discussion is meant to provide the practicing attorney with the type of expert testimony that can be utilized during a lesbian mother custody trial. It is by no means exclusive. Equally important to the types of expert evidence that are used at trial is the selection and preparation of those witnesses who will present the evidence.

### III. SELECTION AND MANAGEMENT OF EXPERT TESTIMONY

Preparation for a lesbian mother custody trial must begin well in advance of the scheduled court date. Early in the development of the case the attorney must evaluate the total fact situation and make strategical decisions regarding the lesbian issue. Although every case will vary in its requirements and every state vary in its rules about the admissibility of expert testimony, some general comments can be made about the selection and management of expert testimony.<sup>80</sup>

#### A. SELECTION OF MENTAL HEALTH EXPERT TO EVALUATE THE FAMILY

The selection of an expert who will conduct an evaluation of the lesbian mother, the children and, possibly, the mother's partner is the most important step in presenting evaluative expert testimony.<sup>81</sup> Any experts being considered should first be interviewed to determine their attitudes toward homosexual parenting, their theory of mental health and their qualifications to conduct a psychological evaluation.

Psychological evaluation is a subjective process. Most psychiatrists and psychologists will attempt to be scientific and neutral in their approach; however, their evaluations will be affected by their training, their own social and personal background and

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80. For a guide to presenting expert testimony in California, see CALIFORNIA CONTINUING EDUCATION OF THE BAR, PREPARING AND EXAMINING EXPERT WITNESSES (1978) [hereinafter EXPERT WITNESSES].

81. The first step in selecting an expert witness is to find qualified people. The following organizations might be of assistance in locating potential experts: Lesbian Mother National Defense Fund, P. O. Box 21567, Seattle, WA. 98111; National Gay Task Force, 80 Fifth Avenue, New York, N.Y. 10011; Lesbian Rights Project, 433 Turk St., San Francisco, CA 94102. Attorneys should also consider contacting local colleges and universities, as well as other lawyers who have handled lesbian mother custody cases, for names of possible experts.

their professional experience.<sup>82</sup> Another factor that should be remembered when selecting such experts is the probability that, in addition to being asked questions about members of the family unit, they will be asked generalized questions about homosexual behavior and its effect on children. Therefore, the experts chosen should have some familiarity with research that has been done in these areas.

It is preferable to have a psychologist or psychiatrist who is willing to meet the parties individually and collectively, in the office and at home. The examining expert must become acquainted not only with the individuals involved, but also with the relationships between family members.<sup>83</sup> The attorney should avoid, if possible, an evaluation that is the result only of psychological testing. Naturally, there is less anxiety involved when these evaluations are conducted months before the hearing as opposed to a couple of weeks before.

#### B. SELECTION OF SOCIAL SCIENTISTS TO GIVE EXPERT TESTIMONY

The social scientists and mental health professionals who are selected to present expert testimony directed at rebutting homophobic myths should also be carefully selected. The attorney

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82. See R. SADOFF, FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS 9-10 (1975).

83. A psychiatrist who has testified as an expert witness in a number of civil and criminal trials advises:

In civil cases, especially in matters of child custody and visitation . . . the consulting psychiatrist must have a comprehensive view of the situation or his opinion is bound to be biased. Unfortunately, in most cases of child custody the psychiatrist is called in by one or the other lawyer, and is not appointed by the court. When this occurs, invariably the other party does not submit to psychiatric examination and only a partial view is obtained. The author feels that it is necessary for the psychiatrist in these matters to have the opportunity of examining the child alone, each parent alone, the parents together and the child in the company of each parent. This multiple examination and evaluation is essential in arriving at an opinion about the child's best interests and welfare as he relates to each of the parents and as they relate to him. . . .

It is essential in domestic relations cases, wherever possible, that all parties involved be examined both alone and in concert, since often the individual factors are not the determining ones but rather the dynamic interrelationship between members of the disrupted family.

*Id.* at 22.

should seek experts who are well qualified in the specific areas in which they will testify. For example, the fact that a person is a psychiatrist does not necessarily mean that s/he has expertise in the sexual development of children. The best experts are those who have specialized training or experience in working with lesbian mothers and their children, and who have conducted research and/or published professional articles on topics that are relevant to the testimony that will be given in court. Perhaps the most important criterion in selecting experts is that they be familiar with the research available on lesbians and lesbian mothering. The opposing party will also be presenting expert testimony. Often in child custody cases there is a battle of the experts, each offering professional, expert opinions that contradict the other. If the experts testifying for the mother are able to refer to psychological or sociological research to substantiate their opinions, their testimony will have more credibility.

To illustrate the importance of the selection of expert witnesses, consider the effect of some of the qualifying testimony of two witnesses:

1. Dr. William Doidge was a clinical psychologist who testified for the father in *Smith v. Smith*.<sup>84</sup> Part of his testimony went as follows:

Q. Dr. Doidge, have you had particular experience in research and practical clinical experience with homosexuality?

A. Yes, I have.

Q. Could you describe to the Court what your research experience has been with homosexuality?

A. In the Air Force in 1956-58, thereabouts, the issue of having homosexuals in the Air Force was really a controversial issue at that time. We were engaged in research to find out whether or not homosexuality was allied with other psychopathology.

What we did was to accomplish some experiments in which we compared controlled normal people together with homosexuals on a wide variety of psychological tests.

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84. No. 125497 (Cal. Super. Ct., Stanislaus County, Feb. 9, 1978).



Q. Has your experience with homosexuality been both with male homosexuality and female homosexuality?

A. Yes, it has.<sup>85</sup>

2. Dr. Richard Green was a psychiatrist who testified on behalf of the mother in *Ranson v. Ranson*.<sup>86</sup> His qualifying testimony included the following:

Q. In what particular areas have you written articles?

A. Again, in 1960 I published my initial paper in the area of sex identity development in children.

Since 1960 I've published in scientific journals approximately 80 articles and/or textbook chapters. The majority of which were of development with human sexuality and again primarily sexual development in children.

For the last at least seven or eight years almost all the publications have been in this area.

....

Q. Doctor, do you have any particular area of expertise in the field of psychiatry?

A. Primarily in the area of human sexuality and within the area of human sexuality, the development of sexual identity in children.

Q. Now, Doctor, during the course of your career, have you had occasion to examine children who have typical as well as atypical sexual development?

A. Yes, I have.

Q. And, have you had occasion to examine women who are lesbians?

A. Yes, I have.

Q. Have you had occasion to examine children whose mothers are lesbians?

A. Yes, I have.<sup>87</sup>

Q. Are you currently involved in any particular type of research?

A. Yes.

Q. Can you describe that for us, just briefly?

A. Again, primarily, the research (r)evolves

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85. *Id.* Reporter's Transcript at 24.

86. No. 477051-8 (Cal. Super. Ct., Alameda County, Nov. 9, 1977).

87. *Id.* Reporter's Partial Transcript of Proceedings, at 5-7.

around the development of sexual identity in children.

One of the projects with which we currently have Health, Education and Welfare funding is the study of children being raised by lesbian mothers and being contrasted with the number of children being raised by divorced heterosexual mothers, so that we have essentially two samples, two groups of children who are being raised, if you will, in the fatherless home; children of both genders and the varying ages with the critical differences between the homes being the fact that in one set of families the mother of the child is essentially homosexual, and living with another female; and in the other homes the mother is essentially heterosexual with plans of another heterosexual marriage, or at least in dating in the heterosexual manner.<sup>88</sup>

### C. PREPARATION OF EXPERT WITNESSES

The preparation of expert witnesses for lesbian mother custody cases does not differ significantly from the preparation of any expert witnesses' testimony. If the witness has not previously testified in court it is important to educate the person about the legal system and its procedures, the roles of the various participants in a trial and what can be expected to happen during their testimony.

Prior to the actual preparation of the witness, the attorney should review published materials in the expert's field, read any writings published by the expert and identify anything that might conflict with the expert's testimony at trial, be familiar with any examinations the expert has conducted and the results, and determine what facts are important to the opinion that will be offered by the expert.<sup>89</sup>

Rehearsing direct and cross-examination with the witness serves two important functions. First, it enables the witness to feel more relaxed about the testimony s/he will give. Second, it provides the attorney with an idea of what kind of witness the expert will be and whether there are any loopholes in the testi-

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<sup>88</sup>. *Id.* at 9.

<sup>89</sup>. EXPERT WITNESSES, *supra* note 80, at 83-84.

mony. The preparation should be sufficiently thorough to preclude any surprises for the attorney as to what the expert will say on the stand.

The expert should be advised that there may be more hostility directed toward them by the judge or opposing attorney than if they were testifying on a less emotionally laden topic. For example, in the *Ranson*<sup>90</sup> case, the following exchange took place at the conclusion of the expert's testimony:

FATHER'S ATTORNEY: Would you tell me your sexual orientation or your preference?

MOTHER'S ATTORNEY: I object on the grounds it is irrelevant.

FATHER'S ATTORNEY: I think it goes to the issue of whether he is biased in this case. It's an issue involving—

MOTHER'S ATTORNEY: Your Honor, I think he's been qualified as an expert witness. He was qualified as an expert witness based upon his qualifications.

I don't think his sexual preference has anything to do with his qualifications as an expert.

THE COURT: Overruled.

THE WITNESS: The question is: My sexual orientation? I'm heterosexual.<sup>91</sup>

#### D. EXAMINATION OF EXPERT WITNESSES

The first step in the effective direct and cross-examination of expert witnesses is to understand the laws of the jurisdiction relating to expert and opinion testimony.<sup>92</sup> In developing trial questions, the attorney should keep in mind that the purpose of presenting expert testimony is to educate and persuade the judge. Therefore, the testimony should be clear and in non-technical language.<sup>93</sup> The bases for expert opinions should be a part of the testimony.

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90. No. 477051-8 (Cal. Super. Ct., Alameda County, Nov. 9, 1977).

91. *Id.* Reporter's Transcript at 36.

92. McElhaney, *Trial Notebook: Direct Examination of Expert Witnesses*, 3 LITIGATION 43 (1977). For California, see Cal. Evid. Code §§ 720-723, 730-733, 801-804 (Deering 1966); J. BROSNAN, TRIAL HANDBOOK FOR CALIFORNIA LAWYERS (1974); EXPERT WITNESSES, *supra* note 80, at 189-201.

93. *Id.*

The cross-examination of the opposing party's expert witnesses is a crucial part of total case presentation. Careful pretrial discovery is the key to good cross-examination.<sup>94</sup> The more that is known about the witness, such as qualifications and opinions, the more prepared the attorney can be. A deposition of the opponent's expert(s) should provide information on the individual's background and qualifications, any writings of the expert, any examinations or tests conducted, the finding or opinions of the witness, any reports produced, and any possible bias.<sup>95</sup> The risk of a thorough deposition is that it provides the opponent with the possible focus of cross-examination at trial. The benefit, however, is that it provides the basis upon which to conduct a concise and revealing cross-examination.

In a lesbian mother custody trial, the mother's attorney should consider conducting a voir dire of the witness and seeking a limited qualification of the witness' expertise. For example, the witness may be a child psychologist who evaluated the children but is totally unfamiliar with the professional literature in the area of lesbian mothers. In such a situation, the attorney could seek a ruling that the expert be allowed to testify as to the emotional stability of the children, but be precluded from offering opinions on the effects generally of a mother's lesbianism on her children.

Many expert witnesses will offer opinions that are personal in nature as opposed to professional. In such instances, the attorney conducting a cross-examination must push for the bases for the opinions that have been expressed. For example, in *Smith v. Smith*<sup>96</sup> the expert witness for the father testified that if the children were allowed to remain with the mother and her partner, they would "pick up the mannerisms, the behavior, and the way of speaking and talking, and gait, and other things that are likely to be decisive in which way these girls will go with their sexual identification. . . ."<sup>97</sup> It was clear as the cross-examination continued that the witness had absolutely no basis for this opinion. In response to the questions of the mother's attorney, the witness

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94. McElhaney, *supra* note 92, at 44.

95. For a checklist of areas to be investigated during a deposition see EXPERT WITNESSES, *supra* note 80, at 79-82.

96. No. 125497 (Cal. Super. Ct., Stanislaus County, Feb. 9, 1978).

97. *Id.* Reporter's Transcript at 41.

admitted that the mother did not have a peculiar way of speaking or walking.<sup>98</sup>

Perhaps the most important caveats for attorneys conducting cross-examinations of expert witnesses are first, not to ask questions to which the answers are not known and second, not to provide the opposing expert the opportunity simply to reiterate opinions already expressed and thereby solidify those opinions in the mind of the judge.

While emphasizing the need for cross-examination to be concise and directed, the attorney should consider cross-examination in the following areas *if* it is relevant to the expert's testimony on direct examination:

1. Whether potential problems identified by the expert could not also arise in heterosexual families. In a general context, this might mean one or two questions directed at the expert's assumptions about heterosexual homes. In a specific context, an example is provided by the facts in *Chaffin v. Frye*.<sup>99</sup> In that case, custody of the children was awarded to the maternal grandparents despite the fact that two of their four children were homosexual.<sup>100</sup> Although the court noted this fact, they did not seem to make the connection that they were awarding custody to people who had already raised two homosexuals.

2. Whether the expert's general opinions about children being raised by lesbians has any relevancy to the facts of the specific case. For example, if the expert testifies that the children will be stigmatized, a question should be directed at whether these children have experienced specific acts of discrimination as a result of the mother's lesbianism.

3. Whether the expert's opinions are supported by psychological and psychiatric research or past experience in working with the children of lesbian mothers.

4. Whether any problems the children are experiencing can be directly attributed to the mother's lesbianism or whether there are other possible explanations for the problems.

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98. *Id.* at 41-43.

99. 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975).

100. *Id.* at 43, 119 Cal. Rptr. at 23.

Psychiatric testimony or evaluations can also be used at the time the family court investigation is being conducted. Relevant articles, reports or letters should be offered to the court investigator who is evaluating the family in order to make a custody recommendation. If any mental health practitioners have seen members of the family, and would support the mother, the attorney should ask the investigator to contact those practitioners.

In *H. v. H.*<sup>101</sup> the psychiatric testimony on behalf of the lesbian mother was so compelling that the suit was dropped and a stipulated agreement for custody to the mother was reached after the trial and before the court rendered a decision.<sup>102</sup>

#### IV. CONCLUSION

Lesbian mothers in contested child custody cases carry a heavy burden in their attempts to retain custody of their children. They are confronted by a great many myths and assumptions about their ability to be good parents. Generally, these assumptions will be shared by the very people who have the power to determine whether and in what way the mothers may continue the relationship with their children.

Although not guaranteed to lead to success, the effective presentation of expert testimony may have a positive impact on the outcome of the case. Such testimony is likely to have the greatest impact in a close case or where the expert testimony is overwhelming. One important function this testimony can serve is to lessen the impact on the court of the mother's lesbianism, thus creating a situation where the mother may be judged on her own individualized merits.

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101. No. 55900 (Ohio Ct. C.P., Div. Dom. Rel., Licking County, Oct. 31, 1973).

102. This information was provided by the attorney for the mother.

